

1 Theodore H. Frank (SBN 196332)  
2 **CENTER FOR CLASS ACTION FAIRNESS LLC**  
3 1718 M Street NW  
4 No. 236  
5 Washington, DC 20036  
6 Tfrank@gmail.com  
7 (703) 203-3848  
8 *In pro per*

9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11  
12 In re:

13 Groupon, Inc., Marketing and Sales Practices  
14 Litigation

Case No. 3:11-md-2238-DMS-RBB

15 **DECLARATION OF THEODORE H.**  
16 **FRANK, OBJECTION TO PROPOSED**  
17 **SETTLEMENT, AND NOTICE OF INTENT**  
18 **TO APPEAR**

19 Date: September 7, 2012  
20 Time: 1:30 p.m.  
21 Courtroom: 10  
22 Judge: Hon. Dana M. Sabraw

I, Theodore H. Frank, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.
2. I am a member of the class, and I object to this settlement for several reasons, but most of all because it unambiguously makes me worse off than if the class action had never been brought. Moreover, because the attorneys and class representatives have breached their duty under Fed. R. Civ. Proc. 23(a)(4) in bringing a class action and negotiating a class action settlement that benefits the attorneys at the expense of the class, the class cannot be certified.
3. I intend to appear at the Final Approval Hearing. My full name is Theodore Harold Frank. My business address is 1718 M Street NW, No. 236, Washington, DC 20036; my home address is available upon request and registered with Groupon under the name "Ted Frank" and email address tfrank@gmail.com. My telephone number is (703) 203-3848. Groupon, Inc., can verify that I have purchased numerous Groupon Vouchers from them, including, but not limited to:

Order Number	Date	Entity	Purchase Price
2891111	April 27, 2010	Finemondo	\$20.00
3053837	May 4, 2010	Shoes, Cup and Cork Club	\$12.00
3205910	May 10, 2010	Casa Oaxaca	\$15.00
3483648	May 20, 2010	Z Pizza	\$10.00
4254750	June 16, 2010	BDs Mongolian Barbeque Bethesda	\$15.00
7856894	September 1, 2010	Corcoran Gallery of Art (two)	\$10.00

These seven Groupon Vouchers are each unredeemed and expired. I eventually recognized that my aspirations for bargains exceeded my free time to use Groupon Vouchers or willingness to shlep to Leesburg to save a few dollars, and stopped using Groupon except for the occasional magazine subscription. The difficulty of dealing with magazine subscriptions through Groupon means that I no longer wish to use Groupon for even that. I have \$50 in unused Groupon credits, and am unlikely to use them, and

1 do not wish to receive any more Groupon credits. As a past Groupon customer, the  
2 prospective injunctive relief is worthless to me.

- 3 4. The settlement is objectionable for several reasons, but most of all because it replaces  
4 Groupon's friendly and exceptionable customer service experience with an unfriendly  
5 class-action claims process that makes class members worse off. As such, there is no  
6 class benefit achieved by the settlement, but the attorneys will collect millions.
- 7 5. Groupon has always provided a money-back guarantee to customers who have had  
8 problems with vouchers; they call this "The Groupon Promise." "[I]f Groupon ever lets  
9 you down, we'll return your purchase—simple as that. Why? Because when we do a bad  
10 job, we want it to be easy for you to punish us. We believe that when a customer has a  
11 bad experience, companies pay for it sooner or later—so we'd rather pay fast so we can  
12 make things right before it's too late." See Andrew, "The Groupon Promise,"  
13 *GrouBlogPon* (Feb. 2, 2010), available at [https://blog.groupon.com/cities/the-groupon-](https://blog.groupon.com/cities/the-groupon-promise/)  
14 [promise/](https://blog.groupon.com/cities/the-groupon-promise/). A true and correct copy of a printout of the blog post, as accessed on July 26,  
15 2012, is attached as Exhibit 1. (Pages on the Groupon website will not print in  
16 "WYSIWYG" fashion for reasons I am not technically adept enough to fix.)
- 17 6. For example, on June 11, 2010, within the class period, I purchased for \$25.00 a Groupon  
18 Voucher for a \$60 "Stock Car Driving Experience" at Old Dominion Speedway in  
19 Manassas, Virginia. Unfortunately, the company rarely had appointment slots open,  
20 and I was unable to redeem my Groupon within the expiry time. In Customer Service  
21 Ticket 3488570 on or about June 5, 2011, before the settlement was signed on March 29,  
22 2012, I protested to Groupon that I could not use the voucher because of the difficulty of  
23 scheduling. With no questions asked, "Joshua G." of Groupon issued me a full cash  
24 refund to my credit card the same day.
- 25 7. On April 9, 2010, within the class period, I purchased for \$30.00 two Groupon Vouchers  
26 to be used at the *kaiten-zushi* restaurant Wasabi Sushi, redeemable only at their  
27 Washington, DC location. Before I could use the Groupon Vouchers, however, that  
28 location went out of business at some point in early 2012, and I somehow did not notice

1 until that summer.

2 8. On January 1, 2012, outside of the class period, with Order Number 68923016, I used  
3 Groupon to purchase a 51-issue subscription to *The Economist* for \$51.

4 9. In July of 2012, I moved my home address. I subscribe to several magazines. My mother  
5 volunteered to do me the favor of contacting these magazine publishers to change my  
6 address, but when she contacted *The Economist*, she was told that I could only change my  
7 mailing address by contacting Groupon because the subscription was through them.

8 10. Thus, on or about July 16, 2012, I did three things. First, I changed my home address on  
9 file with Groupon. Second and third, I filed two customer-service tickets with Groupon.  
10 In Ticket No. 10428534, I asked Groupon to change my mailing address for my *Economist*  
11 subscription. In Ticket No. 10428537, I asked Groupon to refund my \$30 purchase for  
12 Wasabi Sushi because I could not use the vouchers at the closed location.

13 11. For some reason, Groupon had trouble matching my home address on file with  
14 Groupon with the address I wanted on my *Economist* subscription because the customer  
15 service representatives did not have access to that aspect of my account. Though all I  
16 wanted Groupon to do was to provide my new address to *The Economist*, after only three  
17 emails over the course of six days, they apparently decided it was simpler to give me a  
18 full refund, which they did on July 22, 2012, which was both unsolicited and far and  
19 beyond the level of customer service I expect—without even asking, I received a refund  
20 and effectively got six months of *The Economist* for free because of a minor problem with  
21 a Groupon Voucher I purchased outside the class period.

22 12. But the customer service response for the voucher for Wasabi Sushi, which I purchased  
23 during the class period, and sought reimbursement for after the settlement was signed,  
24 was remarkably different. Instead of giving me a refund, Groupon wrote me on July 16,  
25 2012, to tell me that “because this Groupon was purchased between November 1, 2008  
26 and December 1, 2011,” I would have to go to the claims website and fill out a claim  
27 form, whereupon I “may be eligible for a benefit from a class action settlement.”

13. Of course, under the class action settlement, I would not be reimbursed for, at a

1 minimum, several months; even at the earliest possible "Effective Date," my experience  
2 with class action settlement administrators is that it takes them several weeks to process  
3 claims. Moreover, if the settlement fund was exhausted (in part because of the excessive  
4 fee request), I might not be reimbursed in full.

5 14. So, before the class action settlement, I (and presumably other class members) could get  
6 a full cash refund immediately when I had a problem with a Groupon Voucher. For  
7 problems with Groupon Vouchers that I purchased after the class period, and thus not  
8 eligible for the class action settlement, I (and presumably other class members) could get  
9 a full cash refund immediately when I had a problem with a Groupon Voucher without  
10 even asking for one. But for Groupon Vouchers subject to the class action settlement,  
11 instead of getting a full cash refund immediately, I have to go through the hassle of  
12 filling out a claim form and waiting several months—whereupon I might not even get a  
13 full refund.

14 15. By definition, a class action settlement where I (and presumably other class members)  
15 would have been better off if the class action settlement had never existed is unfair.

16 16. Not wanting the hassle of a claims process, I asked Groupon if there was any way I  
17 could avoid the claims process. In response to my email saying "I would just like my  
18 money back, please," the Groupon customer service representative wrote me:

19  
20 Unfortunately, if you wish to claim a refund for a purchase  
21 qualifying for the class action settlement, I am unable to issue the  
22 refund directly. Instead, you'll need to request a claim form by  
visiting <http://grouponvouchersettlement.com> or calling (800) 589-  
1256.

23  
24 I apologize for any inconvenience this might cause. If you have any  
25 more questions about this, please email  
groupon\_notice@grouponvouchersettlement.com for additional  
26 assistance.

27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

1 Matt N  
2 Groupon Customer Support

3 17. Unwilling to accept the absurdity of a scenario where Groupon had handcuffed itself  
4 into offering worse customer service because of a class action settlement, I wrote back  
5 that I did not want an apology, but would rather have my money back and that  
6 Groupon honor its customer satisfaction guarantee, and asked to speak to a supervisor.

7 18. On July 17, 2012, Matt N. wrote back:

8 Hi Ted,

9 I'm sorry for the inconvenience. Normally, a Groupon that falls into  
10 the time frame outlined in the class action lawsuit would have to be  
11 handled through that process. However, I've made an exception  
12 and I've just canceled this order and issued a refund of \$30 Groupon  
13 credit to your account.

14 The credit is available in your account immediately and does not  
15 expire. You can see your available credit by selecting "My Account"  
16 or "My Gifts" from the drop down menu that appears when you  
17 place your cursor over your name in the top right corner of  
18 www.groupon.com. Your available credit will be displayed in the  
19 white box to the right.

20 Regards,

21 Matt N  
22 Groupon Customer Support

23 19. "Matt N" was correct. I did receive \$30 credit to be used in future Groupon purchases on  
24 or about July 17, 2012.

25 20. Thus, the attempt by the class attorneys to claim that the "\$8.5 million settlement fund"  
26 is worth \$8.5 million is entirely fictional. The class attorneys have not won class  
27 members anything that Groupon would not gratuitously provide. Indeed, class  
28 members would seem to be better off if they ignored the class action entirely, as it  
29 appears that Groupon has a customer-satisfaction policy that automatically provides

1 refunds or credits whenever a customer files both a ticket request and then two follow-  
2 up emails. This is a distinct disadvantage from a process where Groupon refunded your  
3 money immediately when you asked.

4 21. The only beneficiaries of this litigation are the class attorneys, who have breached their  
5 fiduciary duty by putting their interests ahead of those of their putative clients.

6 22. The class notice was misleading: it failed to communicate that the settlement made me  
7 worse off. And if I, an experienced attorney who has dealt with dozens of class action  
8 settlements, was misled, it is certain that laypeople class members were misled. Because  
9 I was misled by the class notice as to how bad the settlement was, I did not object by the  
10 original July 7 deadline, nor did I agree to represent any of the class members who  
11 contacted me wishing to object to the settlement on other grounds. (I thought the  
12 settlement unfair, but thought that the unfairness was similar to another case I already  
13 had pending in the Ninth Circuit, so was less interested in spending my limited time on  
14 the case.) It was only when Groupon initially claimed to me that the class action  
15 settlement precluded it from honoring its money-back guarantee that I decided to object:  
16 thousands, and perhaps millions, of Groupon customers are being prejudiced by this  
17 settlement, and may not be as persistent as I was about avoiding the unfair claims  
18 procedure.

19 23. The class attorneys seem to be taking credit for injunctive relief, but the injunctive relief  
20 does not make class members better off than the pre-existing customer-service  
21 guarantee. On May 22, 2012, I wrote class counsel Rachel Jensen at rachelj@rgrdlaw.com:

22 Ms. Jensen,

23 Several class members have inquired to me about the fairness of the  
24 settlement in this case, and I'm a class member myself though my  
25 notice hasn't yet shown up. If you can point me to persuasive  
26 evidence that the injunctive relief of permitting expired Groupons  
27 be used for purchase value was at the behest of class counsel rather  
than a unilateral change in Groupon policy, I'd be inclined to refrain  
from objection. My impression, perhaps mistaken, was that this was

1 Groupon policy since the inception of the company. How exactly  
2 has the settlement changed policy with respect to pre-existing  
3 expired Groupons?

4 Many thanks,

5 Ted Frank

6 24. Neither Ms. Jensen nor any other class counsel ever responded to my email. Ms. Jensen's  
7 declaration in support of the fee request fails to identify, much less value, any marginal  
8 improvement to consumers from the injunctive relief. (The settlement website  
9 misleadingly implies that the policy permitting use of the paid-for amount of the  
10 voucher after its expiration is a benefit of the class action rather than a pre-existing  
11 policy. Exhibit 2 is a true and correct copy of a printout of a 2010 Groupon blog post<sup>1</sup>  
12 discussing their rules for expired vouchers.) On information and belief, the injunctive  
13 relief is entirely gratuitous, because it represents no improvement in Groupon policies,  
14 and thus cannot be considered a benefit to the class from the class action settlement.  
15 American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.13 Illustration 2  
16 (2010). Even if the prospective injunctive relief could be considered a class benefit, it is of  
17 no benefit to class members like me who no longer do business with Groupon.

18 25. This case is exactly analogous to *In re Aqua Dots Prod. Liab. Lit.*, 654 F.3d 748 (7th Cir.  
19 2011). In *Aqua Dots*, the defendant had already established a policy of full refunds to  
20 class members. The Seventh Circuit held that a class seeking relief that was already  
21 being offered could not be certified under Fed. R. Civ. Proc. 23(a)(4): there was no relief  
22 that the class attorneys could achieve that would not make class members worse off than  
23 the *status quo*, and thus the class action was being brought for the benefit of the  
24 attorneys, rather than the class. Thus, the class representatives were not adequate  
25 representatives of the class, and the class could not be certified. Similarly here, the class  
26 representatives have agreed, apparently in the hopes of an "incentive payment" and to  
27

28 <sup>1</sup> <https://blog.groupon.com/cities/groupon-organizes-class-action-against-itself/>



1 favor their attorneys with a multi-million-dollar fee, to a settlement that actually makes  
2 class members worse off. This case is *worse* than *Aqua Dots*, where the problem of the  
3 class action costing the class members was wholly hypothetical. Here the scenario of an  
4 abusive self-dealing settlement at the expense of the class has actually been realized.

5 26. I am an attorney, and a member of the bar of, *inter alia*, the state of California and of the  
6 Southern District of California. I am an elected member of the American Law Institute.  
7 As the founder of the non-profit Center for Class Action Fairness LLC, I have  
8 successfully represented *pro bono* numerous class members in objections to unfair  
9 settlements, winning millions of dollars for class members. *E.g.*, *In re Bluetooth Headset*  
10 *Prod. Liab. Lit.*, 654 F.3d 935 (9th Cir. 2011); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir.  
11 2011); *Robert F. Booth Trust v. Crowley*, 2012 U.S. App. LEXIS 11927 (7th Cir. Jun. 13,  
12 2012); *Dewey v. Volkswagen AG*, 681 F.3d 170 (3d Cir. 2012); *In re Classmates.com*, 2012 U.S.  
13 Dist. LEXIS 83480 (W.D. Wash. Jun. 15, 2012). Because of this background, it has been  
14 my experience that class action attorneys often attempt to discredit my objections by  
15 accusing me of being a “professional objector” bringing an objection in bad faith, despite  
16 my track record of success in court. This is wrong: a “professional objector” is a term of  
17 art to describe a for-profit objector that attempts to hold up settlements in the hopes of  
18 negotiating a *quid pro quo* payment for himself to withdraw his objection or appeal. As  
19 has been widely documented, I have never agreed to withdraw an objection or appeal in  
20 exchange for payment. *E.g.*, Ashby Jones, “A Litigator Fights Class-Action Suits,” *Wall*  
21 *Street Journal* (Oct. 31, 2011). But if the Court has any skepticism whether I bring this  
22 objection in good faith in the interests of the class at large, I will be happy to stipulate to  
23 an injunction forbidding me or any affiliated entities from receiving payment to settle  
24 my objection. *Cf.* Brian T. Fitzpatrick, “The End of Objector Blackmail?”, 62 *Vanderbilt L.*  
25 *Rev.* 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail  
26 problem).

27 27. At least nine separate class members, including lawyers, a law professor, and an  
Eleventh Circuit clerk, contacted me to complain about this settlement, and I could have

1 easily chosen to bring an objection on behalf of one or more of them. More would have  
2 done so had I blogged about the problems of the settlement before filing an objection.  
3 But rather than take on a client, I am personally objecting because my personal customer  
4 service experience with Groupon demonstrates both why this settlement is unfair, and  
5 why the class representatives cannot meet the Rule 23(a)(4) requirement.

6 28. I further object to the attorneys' fees. Because the settlement makes class members worse  
7 off, any fees to the attorneys, much less the millions of dollars that they have requested,  
8 are by definition disproportionate under *Bluetooth* and under *Dennis v. Kellogg Co.* (9th  
9 Cir. July 13, 2012). I further note that at least some of the "\$8.5 million" is earmarked to  
10 be paid to the class in coupons, and, even if the settlement were approved, the fee  
11 request is inconsistent with the requirements of 28 U.S.C. § 1712 that fees be based on the  
12 value of the *redeemed* coupons, rather than their face value. It is certain that some of the  
13 coupons (which are misleadingly called "Settlement Vouchers") will not be redeemed,  
14 because there is a 130-day time-limit for their use. (In contrast, my \$30 in Groupon Bucks  
15 that I received as reimbursement for my unused Wasabi Groupon Voucher will last as  
16 long as Groupon does.)

17 29. The \$8.5 million figure is further illusory, because it includes the costs of "claims  
18 administration." Claims administration should not be treated as a class benefit. To do so  
19 would lead to the absurd conclusion that the class is indifferent between an \$8 million  
20 settlement where \$1 million is spent on claims and \$7 million on administration and a  
21 settlement where \$7 million is spent on claims and \$1 million on administration. Class  
22 members clearly prefer the latter settlement. It is for this reason that attorneys' fees  
23 should be based on the amount the class actually receives, rather than the amount paid  
24 by the defendant. *See Bluetooth, supra; Dennis, supra* (noting disproportion between \$2  
25 million in fees and \$800,000 in class recovery, notwithstanding the millions of dollars of  
26 *cy pres* in the settlement and the cost of settlement administration). Class counsel  
27 achieves the "25% benchmark" only by this artificial inflation of the denominator to  
28 include money not actually being paid to the class—even aside from the fact that the \$8.5

1 million fund is a *reduction* from the pre-settlement status quo in what class members  
2 could have received from Groupon if everyone entitled to make a claim made a claim.

3 30. The *cy pres* component is objection because money is paid to *cy pres* before it is paid to  
4 the class; this is inconsistent with Section 3.07 of the American Law Institute's *Principles*  
5 *of the Law of Aggregate Litigation*, which prohibits the use of *cy pres* if it would be feasible  
6 to pay money to the class instead.

7 31. I incorporate by reference any other objections filed in this case that are not inconsistent  
8 with my objection.

9 32. I reserve the right to cross-examine any witnesses who testify in support of the  
10 settlement.

11 33. For the foregoing reasons, I ask that this Court deny the motion to approve the  
12 settlement, and rule that the class cannot be certified pursuant to Rule 23(a)(4) and *Aqua*  
13 *Dots*. If the Court does approve the settlement, the fee request should be reduced to a  
14 token amount to reflect that the class benefit is largely illusory, and nowhere near worth  
15 \$8.5 million to the class. At a minimum, the fee award must comply with the Class  
16 Action Fairness Act's strictures on coupon settlements.

17 I declare under penalty of perjury under the laws of the United States of America that  
18 the foregoing is true and correct.

19 Executed on July 27, 2012, in Salt Lake City, Utah.

20 /s/ Theodore H. Frank  
21 Theodore H. Frank  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system thus effectuating service of such filing all ECF registered attorneys in this case. I further certify that I caused the foregoing document to be sent via first class mail to the following participants at the addresses listed below:

John J. Stoia, Jr.  
Robbins Gellar Rudman & Dowd LLP  
655 West Broadway, Suite 1900  
San Diego, CA 92101

Shirli F. Weiss  
DLA Piper LLP (US)  
401 B Street, Suite 1700  
San Diego, CA 92101

DATED this 27th day of July, 2012.

(s) Theodore H. Frank  
Theodore H. Frank